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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

GERALD M. GEIGER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 19, 1985

QUESTION PRESENTED

Whether this court's decision in *Molinaro v. New Jersey*, 396 U.S. 365 (1970), holding that a fugitive criminal defendant is disentitled from prosecuting *in abstentia* an appeal of his or her conviction, extends to prevent the state court appointed conservator of the estate of a missing defendant from participating in a civil action for forfeiture of the estate's property brought by the government pursuant to 21 U.S.C. § 881(a)(6).

INDEX

	Page
Question Presented	(i)
Opinion Below	1
Jurisdiction	1
Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	11
1. The Decision Below Conflicts With the Decision of the Sixth Circuit as to the Proper Interpretation and Application of This Court's Decision in *Molinaro v. New Jersey* in the Context of Civil Forfeiture Proceedings	11
2. The Decision Below Raises An Important Question as to the Scope of the Class of Persons Denied Access to the Courts Based On This Court's Decision In *Molinaro v. New Jersey*	19
Conclusion	25
Appendix	A-1
Opinion of the Court of Appeals .	A-1
Order Denying Intervention	A-33
Order Granting Summary Judgment .	A-40
Judgment	A-49

CITATIONS

CASES

Molinaro v. New Jersey
396 U.S. 365 (1970) ..... passim

Broadway v. City of Montgomery
530 F.2d 657 (5th Cir. 1976) ... 20

Conforte v. C.I.R.
459 U.S. 1309 (1982) 23

Conforte v. Commissioner
692 F.2d 587 (9th Cir. 1982) ... passim

Doyle v. Department of Justice
668 F.2d 1365 (D.C. Cir. 1981),
cert. den. 455 U.S. 1002 ..... 20, 23

Schuster v. United States
765 F.2d 1047 (11th Cir. 1985) . 17, 20

United States ex. rel. Bailey v. U.S.C.O. of P.M., U.S. Army
496 F.2d 324 (1st Cir. 1974) ... 20

United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453
(7th Cir. 1980) 21

United States v. $2,500 in United States Currency, 689 F.2d 10,
cert. den. 104 S.Ct. 1591 13

United States v. $45,940 in United States Currency, 739 F.2d 792
(2d Cir. 1984) 16

United States v. $83,320 in United States Currency, 682 F.2d 573 (6th Cir. 1982) ..... passim

United States v. $129,374 in United States Currency, 769 F.2d 583 (9th Cir. 1985) ..... passim

STATUTES AND RULES

21 U.S.C. § 881(a)(6) ..... passim

28 U.S.C. § 41 4

28 U.S.C. § 86 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 4

28 U.S.C. § 1294(1) 4

28 U.S.C. § 1345 4

28 U.S.C. § 1355 4

31 U.S.C. § 5316 ..... 16, 17

F.R.C.P. 24 ..... 7, 9

Cal. Probate Code § 1845 6

Cal. Probate Code § 2462 ..... 10, 18

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GERALD M. GEIGER, Petitioner,

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UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Gerald M. Geiger, state court appointed conservator of the estate of Lewis Michael Geiger, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 21, 1985.

OPINION BELOW

The opinion of the Court of Appeals, captioned *United Staes v. $129,374 in United States Currency*, is reported at 769 F.2d 583 and is reproduced in the appendix hereto. The orders and judgment of the District Court for the Southern District of California were not certified for publication and appear in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 21, 1985, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

United States Code, Title 21:

§ 881. *Forfeitures*

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

Petitioner respectfully seeks review of the judgment and order of the Court of Appeals affirming the order of the District Court for the Southern District of California denying petitioner's motion to intervene in a civil forfeiture proceeding initiated by the government pursuant to 21 U.S.C. § 881(a)(6) and the subsequent judgment of the district court upon the government's motion for summary judgment in that proceeding. The district court had subject matter jurisdiction of the forfeiture proceeding pursuant to 21 U.S.C. § 881(a)(6) and 28 U.S.C. §§ 1345 and 1355. The jurisdiction of the Court of Appeals was founded on 28 U.S.C. § 1291, with geographic jurisdiction pursuant to 28 U.S.C. §§ 41, 84 and 1294(1).

Lewis Michael Geiger, brother of the petitioner, was arrested on April 22, 1983, and subsequently charged with violations of federal narcotics laws. In conjunction with Lewis Geiger's arrest, his home in Encinitas, California, was searched, and government agents seized certain items of personal property, including United States currency, gold coins and silver bars. The government, between June 22 and July 21, 1983, filed six civil actions in the United States District Court for the Southern District of California, pursuant to 21 U.S.C. § 881(a)(6), seeking forfeiture of this property to the United States. These six complaints were consolidated into one action by order of the district court on October 11, 1983.

Lewis Geiger, previously released on bail, was thereafter convicted of various

narcotics violations on stipulated facts and his sentencing was then scheduled for December 5, 1983. Having failed to appear on that date and again on December 6, 1983, the court forfeited bail and issued a bench warrant. Lewis Geiger has not since reappeared.

Following Lewis Geiger's disappearance, on April 13, 1984, Gerald M. Geiger, the defendant's only living blood relative, petitioned for and was granted letters of conservatorship under California Probate Code § 1845 by the California Superior Court for the County of San Diego.[1]

On May 4, 1984, the government moved for summary judgment in the consolidated

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[1] Lewis Geiger is presently considered a missing person within the meaning of California Probate Code § 1845, et seq.

forfeiture proceeding. Thereafter, as conservator of Lewis Geiger's estate, the petitioner applied to the district court to intervene in the consolidated civil forfeiture proceeding both as of right and permissively under rules 24(a)(2) and (b)(2) of the Federal Rules of Civil Procedures, in order to protect the estate's interest in the seized property.[2]

The district court denied the motion to intervene on July 30, 1984, and entered its order on August 22, 1984. The district court held that the

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[2] The government and the conservator initially stipulated on June 1, 1984, to this intervention and the conservator prepared and filed a written memorandum in opposition to the government's motion for summary judgment. The district court, however, subsequently disapproved the stipulation and ordered the parties to brief the question of whether the conservator should be permitted to intervene.

conservator lacked the standing necessary to assert the interests of the estate in the civil forfeiture action, relying on *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (per curiam) and *Conforte v. Commissioner*, 692 F.2d 587 (9th Cir. 1982). The district court found that Lewis Geiger had disentitled himself from contesting the forfeiture by fleeing the jurisdiction and that the conservator, who the court held stood in the place of Lewis Geiger, was likewise disentitled from contesting the forfeiture. Accordingly, the district court ordered stricken from the record the conservator's brief in opposition to the government's motion for summary judgment.

On August 20, 1984, the district court held a hearing on the government's summary judgment motion. Having stricken the conservator's opposition, the court

found that no party presented evidence to rebut the government's showing of probable cause for forfeiture. The court therefore granted the government's motion and entered its order and judgment of forfeiture on October 15, 1984.

The Court of Appeals affirmed the district court's order and judgment. *United States v. $129,374 in United States Currency*, 769 F.2d 583 (9th Cir. 1985). The Court of Appeals held that while the conservator was otherwise entitled to intervene as of right pursuant to rule 24(a)(2) of the Federal Rule of Civil Procedure, the conservator was disentitled from participating in the consolidated forfeiture proceeding by virtue of the disentitlement doctrine of *Molinaro* and *Conforte*. The Court of Appeals reasoned that the disentitlement doctrine barred the intervention by "a

fugitive's successor-in-interest" in a civil forfeiture proceeding, finding that the conservator's claim was solely derivative of any claim or defense that Lewis Geiger may have maintained. The Court of Appeals did acknowledge, however, that the conservator was charged with a fiduciary responsibility to prosecute and defend all claims involving property in which the estate has an interest pursuant to California Probate Code § 2462. *United States v. $129,374*, 769 F.2d at 587.

In so holding, the Court of Appeals expressly stated its disagreement with the decision of the Court of Appeals for the Sixth Circuit in *United States v. $83,320 in United States Currency*, 682 F.2d 573 (1982), where that court refused to extend the *Molinaro* disentitlement doctrine to an appeal from a judgment in

favor of the government in a civil forfeiture proceeding under the same statute involved as in the motion below, 21 U.S.C. § 881(a)(6).

On August 28, 1985, the government and the conservator stipulated, and the district court ordered, that the subject property be liquidated and held in separate interest bearing accounts, and that execution not take place, pending the disposition by this Court of this petition and subsequent proceedings. In reliance on this stipulation and order, the conservator has not sought a stay of the Ninth Circuit's mandate or of the district court's judgment.

REASONS FOR GRANTING THE WRIT

1. *The Decision Below Directly Conflicts With the Decision of the Court of Appeals for the Sixth Circuit as to the Proper Interpretation and Application of This Court's Decision in Molinaro v. New Jersey, in the Context of Civil Forfeiture Proceedings.*

In *Molinaro v. New Jersey*, 396 U.S. 365 (per cuariam) (1970), this Court refused to consider, and dismissed, an appeal from a criminal conviction rendered in a state court proceeding, where the defendant-appellant had fled the jurisdiction while the appeal was pending. *Molinaro, supra* at 366. The Court held that, "While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims." *Ibid*.

In reliance on the *Molinaro* decision, the Ninth Circuit here held that "a fugitive's successor-in-interest," in this instance the state court appointed conservator for the estate of the missing defendant, is barred from intervening and interposing defenses in a civil forfeiture proceeding commenced by the government pursuant to 21 U.S.C. § 881(a)(6). *United States v. $129,374*, 769 F.2d at 587. That statute provides that property purchased with the proceeds from, or used in, illegal narcotics transactions may be forfeited to the United States.[3] The Ninth Circuit

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[3] In such an action the government need only show probable cause for the forfeiture less than prima facie proof, and thereupon the burden of proof shifts to the claimant to demonstrate by a preponderance of the evidence that the property was not purchased with the proceeds from, or used
(Footnote Continued)

reasoned that the conservator's claim is derivative of the claim of the missing defendant, such that if the defendant would be barred by the disentitlement doctrine, so should the conservator. The Ninth Circuit characterized this as a "limited extension" of the *Molinaro* disentitlement doctrine, and consistent with its prior decision in *Conforte v. Commissioner of Internal Revenue*, 692 F.2d 587, 590 (9th Cir. 1982) in which it had previously extended the *Molinaro* doctrine to bar a fugitive convicted of criminal tax evasion from prosecuting a related civil tax appeal.

In its holding below, the Ninth Circuit expressly disagreed with the

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(Footnote Continued)
illegal narcotics transactions. United States v. $2,500 in U.S. Currency, 689 F.2d 10, 12 (2d Cir. 1982) cert. den. 104 S.Ct. 1591.

decision of the Sixth Circuit in *United States v. $83,320 in U.S. Currency*, 682 F.2d 573 (6th Cir. 1982). 769 F.2d at 589. In that case, the Sixth Circuit refused to extend the *Molinaro* decision to bar a fugitive from prosecuting an appeal from a forfeiture judgment in favor of the government rendered pursuant to the identical statute involved in petitioner's case, 21 U.S.C. § 881(a)(6). The court there reasoned that, "The individual accused of the related criminal violation is not necessarily the only individual with a direct, litigable interest in the outcome of the forfeiture action." 682 F.2d at 576. Furthermore, a forfeiture action is an *in rem* proceeding in which the property is the defendant, irrespective of the criminal conduct of its prior owner. Consequently, "the escape of the criminal

defendant should not be raised as a bar to those who may have a legitimate, innocent interest in exonerating the defendant property from its wrongdoing." *Ibid*.

In response to this reasoning, the Ninth Circuit stated that, "Mere speculation that innocent third parties might have an interest in the forfeited property is not sufficient to overcome the application of the *Molinaro/Conforte* disentitlement doctrine in this case." *United States v. $129,374*, 769 F.2d at 589. The Ninth Circuit observed, however, that the conservator himself was an individual creditor of the estate by virtue of being a co-surety on the forfeited bail bond of the missing defendant, against whom the government may ultimately seek satisfaction of the bail bond, and might have sought leave to

intervene in his individual capacity. *Ibid*.

In its opinion, the Ninth Circuit noted the decision of the Second Circuit in *United States v. $45,940 in United States Currency*, 739 F.2d 792 (2d Cir. 1984), in which that court applied the *Molinaro* doctrine to bar the claimant, a fugitive, from seeking review of a district court judgment granting forfeiture under § 231 of the Bank Secrecy Act of 1970, 31 U.S.C. § 5316. However, the Second Circuit expressly recognized the Sixth Circuit's concern for the rights of innocent third parties, but concluded that the Sixth Circuit failed to "consider that the government was seeking to dismiss *only the fugitive's appeal*, which would not prejudice any other claimant" and, on that basis, declined to arrive at the

same result as the Sixth Circuit. *Id.*, at 797 (emphasis added). The Second Circuit also noted that, unlike 21 U.S.C. § 881 applicable here, § 231 of the Bank Secrecy Act of 1970, 31 U.S.C. § 5316 expressly required notice to all other interested parties thereby insuring that the due process rights of parties other than the fugitive defendant were sufficiently protected.[4]

The Ninth Circuit nevertheless felt that the conservator in the present case "stood in the shoes" of the missing defendant, although it conceded that the

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[4] Following argument of this case before the Ninth Circuit, the Eleventh Circuit in Schuster v. United States, 765 F.2d 1047 (1985) has indicated that in the context of an in rem forfeiture proceeding where persons other than the missing defendant have an interest, application of the Molinaro disentitlement doctrine may be inappropriate. 765 F.2d at 1050, n. 19.

conservator is charged under California Probate Code § 2462 (West 1981) with a fiduciary responsibility to prosecute and defend all claims involving property in which the estate has an interest. *United States v. $129,374*, 769 F.2d at 589.

The conflict between the Ninth Circuit and the Sixth Circuit is irreconcilable. The Sixth Circuit would exclude the *Molinaro* disentitlement doctrine entirely from civil forfeiture actions, and both the Sixth and Second Circuits apparently would exclude the application of this doctrine from any civil action involving the interests of persons other than the missing defendant. The Ninth Circuit, on the other hand, would apply that doctrine not only to the fugitive, but also to anyone whose rights in any civil action could be deemed derivative in some fashion from the rights of the

fugitive. These conflicts justify the grant of a writ of certiorari to review the judgment below in order to resolve a conflict in an area of the law evolved from this Court's decision in *Molinaro* which affects the substantial due process rights of innocent third parties in forfeiture proceedings.

2. *The Decision Below Raises an Important Question as to the Scope of the Class of Persons Denied Access to the Courts Based on This Court's Decision in Molinaro v. New Jersey.*

It has been 15 years since this Court's *per curiam* decision in *Molinaro* and during that time several Courts of Appeal have extended that decision beyond its original application barring fugitive defendants from prosecuting a direct appeal from their criminal conviction, to preclude a fugitive from access to the courts in civil matters directly related

to the criminal matter.[5] In the present case, the Ninth Circuit has taken two steps beyond this line of cases. First, it has applied the *Molinaro* doctrine in a civil *in rem* forfeiture action. As observed by the Sixth Circuit in *United States v. $83,320*, a forfeiture action permits condemnation of property without regard to the owner's culpability, which "is explained by the fact that historically forfeiture is a civil proceeding *in rem*. The vehicle or other inanimate object is treated as being itself guilty of wrongdoing, regardless of its owner's conduct." 682 F.2d at

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[5] Broadway v. City of Montgomery, 530 F.2d 657 (5th Cir. 1976); United States ex rel. Bailey v. U.S.C.O. of P.M., U.S. Army, 496 F.2d 324 (1st Cir. 1974); Doyle v. Department of Justice, 668 F.2d 1365 (D.C. Cir. 1981) (per curiam), cert. den. 455 U.S. 1002 (1982); Conforte, supra; Schuster, supra.

576, *quoting United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 354 (7th Cir. 1980). Forfeiture proceedings do not depend upon the criminal conduct of the owner of the subject property, yet permit an adjudication of title to the subject property against the whole world.

Second, the Ninth Circuit has used the *Molinaro* doctrine to bar someone other than the fugitive from appearing in court to participate in an otherwise adjudicable case or controversy. Indeed, the Ninth Circuit's decision bars such a person, not merely from commencing an original proceeding, but also from interposing defenses in an action instituted by another person, here the government. The principle enunciated by the Ninth Circuit would equally bar an innocent bona fide assignee of a missing

defendant from defending its claim to the assigned property.

Constitutional principles of due process require much greater scrutiny by this Court where its disentitlement doctrine is extended from a fugitive petitioning the courts for redress from his/her criminal conviction to a third person defending against claims prosecuted by the government. To deny anyone, let alone a state court appointed conservator, from exercising their due process rights to protect their "legitimate, innocent interests in exonerating the defendant property from its wrongdoing . . . ." (*United States v. $83,320, supra*, at 576) solely on the basis of actions of another person over which they have no control, goes beyond the boundaries of fairness and justice mandated by the United States Constitution.

In the 15 years since this Court rendered its decision in *Molinaro*, the Court has given no additional guidance as to the scope of that decision's application. The Court has previously denied petitions for certiorari from cases in which the courts of appeal have prevented a fugitive from initiating a related civil action to obtain redress for personal or property rights.[6] However, the situation presented by the Ninth Circuit's current opinion goes far beyond those prior cases by preventing someone other than the fugitive from defending against the government's forfeiture action, and directly conflicts with the

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[6] Doyle v. Department of Justice, supra, cert. den. 455 U.S. 1002 (1982); Conforte v. C.I.R., 459 U.S. 1309 (1982) (per Rehnquist, J. as Circuit Justice) (stay of dismissal order of Court of Appeal denied).

Sixth Circuit's application of *Molinaro* and with the reasoning expressed by the Second and Eleventh Circuits.

The decisions of the Ninth and Sixth Circuits represent decidedly different policies. The Sixth Circuit is concerned that the *Molinaro* doctrine not "be raised as a bar to those who may have a legitimate, innocent interest in exonerating the defendant property from its wrongdoing." *U.S. v. $83,320*, 682 F.2d at 576. The Ninth Circuit, however, does not want to indirectly benefit "an individual who was flouting legal process [and] has no entitlement to engage the court's resources to adjudicate his claims in an action related to his prior criminal conviction." *U.S. v. $129,374*, 769 F.2d at 587.

This serious conflict appears to arise between the need of the courts to

insure compliance with their process versus the due process rights of individuals to have their claims, or defenses, adjudicated. Because of the fundamental importance of such questions arising from disparate applications of this Court's prior decision, it is imperative that this Court resolve these conflicting policies.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the

judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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November 19, 1985

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. $129,374 IN UNITED STATES CURRENCY, Defendant, AND ALL RELATED ACTIONS GERALD M. GEIGER, as conservator of the estate of Lewis Michael Geiger, Applicant for Intervention-Appellant.	No. 84-6419 D.C. No. CV 83-1178-K OPINION

Appeal From the United States District Court for the Southern District of California Judith N. Keep, District Judge, Presiding Argued and Submitted June 4, 1985, Los Angeles, California

Before: WALLACE, TANG, and WIGGINS, Circuit Judges.

WALLACE, Circuit Judge:

Gerald Geiger (Gerald) appeals from the district court's denial of his motion

to intervene in a forfeiture proceeding under 21 U.S.C. § 881(a)(6) concerning property belonging to his fugitive brother, Lewis Geiger (Lewis). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

This matter stems from a search pursuant to a warrant of Lewis' home that was conducted on April 22, 1983. The search produced significant quantities of cocaine. The officers also seized United States currency, gold and silver coins and ingots, and three vehicles on the ground that they were believed to be the proceeds of unlawful narcotics transactions, and thus forfeitable under 21 U.S.C. § 881(a)(6). Lewis was arrested later that day, along with two others who lived with him.

Lewis was released on bail upon the posting of a $150,000 personal surety bond. Gerald and Elaine Geiger, Lewis' brother and sister-in-law, signed as cosureties and secured the bond with their home. After the district court rejected Lewis' challenge to the validity of the search warrant, he waived his right to a jury trial and submitted the criminal case for decision on stipulated facts. He was found guilty on three counts of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846, possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), and possession of an unregistered machine gun in violation of 26 U.S.C. §§ 5861(d), 5871.

In June and July of 1983, while the criminal charges against Lewis were still

pending, the government initiated the present forfeiture proceedings under 21 U.S.C. § 881(a)(6) against various items seized from Lewis' residence and his person. Six separate complaints were filed and subsequently consolidated. The items involved here include fifty 100-ounce silver bars, seventy-two 1-ounce gold pieces, seven 10-ounce silver pieces, U.S. currency ($129,374 and $1,013), a 1947 Ford Woodie Wagon, and a 1982 Jeep Wagoneer.

Lewis and his codefendant girlfriend filed claims contesting the forfeiture of the silver, the gold and the $129,374 in currency. Lewis separately contested the forfeiture of the two vehicles and the $1,013 in currency. His lawyers filed claims contesting the forfeiture of all of these items on the basis of Lewis'

purported assignment of the property subsequent to his arrest.

Lewis' sentencing was scheduled for December 5, 1983. He failed to appear and the sentencing hearing was continued until the following day. He again failed to appear. The court then issued a warrant and declared his personal surety bond forfeited. On December 30, 1983, the government filed a motion for judgment on default of the forfeited bond.

Before the hearing on that motion, Gerald filed a petition in state court to declare himself conservator of Lewis' estate. The state court approved Gerald's conservatorship on April 13, 1984.

Gerald, in his capacity as conservator of Lewis' estate and in his personal capacity as cosurety of Lewis' bond, moved on May 4, 1984, to set aside the

forfeiture of the bail bond. Acknowledging the absence of any evidence that Lewis was dead, Gerald did not contest the entry of judgment against Lewis' estate but asked that judgment not be entered against himself and his wife--the innocent cosureties.

After numerous continuances, a hearing was held on the government's motion for judgment of default on the bond and the motion to set aside forfeiture. After noting Lewis' past criminal record, the substantial sentence recommended by the probation department of which Lewis was aware, and the circumstances of Lewis' disappearance, the district court found against Lewis' estate and against Gerald and Elaine Geiger. Judgment in the bail bond forfeiture was entered on August 2, 1984.

On May 4, 1984, the government moved for summary judgment in the consolidated forfeiture proceedings. The government argued in part that because Lewis was a fugitive from justice, he had disentitled himself to contest the forfeiture.

Gerald moved to intervene as conservator of Lewis' estate both as of right and permissively under Fed. R. Civ. P. 24(a)(2), (b) (2). Gerald also filed an opposition to the government's summary judgment motion. No other opposition to the government's summary judgment motion was filed. Although the government initially stipulated to intervention by Gerald, it subsequently urged the district court to deny the conservator's motion to intervene on the ground that he lacked standing to contest the forfeiture because he stood in the shoes of the fugitive defendant.

The district court denied the motion to intervene. Relying principally on *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (per curiam) (*Molinaro*), and *Conforte v. Commissioner*, 692. F.2d 587 (9th Cir. 1982) (*Conforte*), the court held that Lewis had disentitled himself from contesting the forfeiture and thus the conservator who merely stood in Lewis' shoes lacked standing to intervene. Accordingly, the district judge ordered stricken from the record the conservator's brief in opposition to the government's summary judgment motion. The order denying intervention was entered on August 22, 1984.

On August 20, 1984, the district court held a hearing on the government's motion for summary judgment, and found that the government had met its burden of demonstrating probable cause for the

forfeiture under 21 U.S.C. § 881(a)(6). No evidence was introduced to refute the government's showing of probable cause. As a result, the district court granted the government's motion for summary judgment, and entered its order on October 15, 1984.

On October 22, 1984, Gerald, as conservator of Lewis' estate, timely filed a notice of appeal seeking review of both the district court's denial of his motion for intervention and the summary judgment in favor of the government.

II

Generally, a party is entitled to intervention as of right if he satisfies the four-part test set forth in rule 24(a)(2), Fed. R. Civ. P.:

> (1) the applicant's motion must be timely; (2) the applicant must assert an interest

> relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that without intervention the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the other parties.

Smith v. Pangilinan, 651 F.2d 1320, 1323-24 (9th Cir. 1981) (*Smith*). Rule 24(b)(2), Fed. R. Civ. P., provides for permissive joinder "when an applicant's claim or defense and the main action have a question of law or fact in common." We review a district court's order denying intervention as of right de novo, *see, e.g., Smith*, 651 F.2d 15 1324-25, except for the issue of timeliness, which is reviewed for abuse of discretion. *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). In contrast, permissive intervention is committed to the broad

discretion of the district court. *See Smith*, 651 F.2d at 1325; *Blake v. Pallan*, 554 F.2d 947, 951 n.5 (9th Cir. 1977).

A.

The district court denied the conservator's motion to intervene, agreeing with the government that he lacked standing to contest the forfeiture. The court reasoned that under the rationale of *Molinaro*, 396 U.S. at 366, and *Conforte*, 692 F.2d at 590, Lewis and the conservator, who stood in Lewis' shoes, were disentitled from contesting the government's civil forfeiture claim.

The conservator essentially argues that the district court erroneously confused the concepts of standing and rule 24's requirements for intervention. He asserts that he demonstrated a sufficient interest in the property involved in the forfeiture proceeding to satisfy

any standing requirements of rule 24, and therefore he should have been allowed to intervene as of right. He contends that the district court's discussion of the *Molinaro/Conforte* disentitlement doctrine was premature. That issue, he continues, should have been reserved until the hearing on the government's motion for summary judgment, at which time the conservator could have presented evidence bearing upon the issue of whether Lewis was in fact a fugitive.

To the extent that the district court's order is based upon a theory of standing, we agree with the conservator. We admit that this is not an issue on which we have given clear guidance. We have held that a motion to intervene may be denied when an applicant fails to demonstrate standing to pursue his claim, *e.g.*, *DuPree v. United States*, 559 F.2d

1151 (9th Cir. 1977). Nevertheless, the principal focus of a motion to intervene under rule 24 is whether an applicant has "show[n] that he has a 'protectable interest' in the outcome of the litigation of sufficient magnitude to warrant inclusion in the action." *Smith*, 651 F.2d 15 1324. Lewis certainly has an interest in defending an action to forfeit his property. The conservator of his estate, who stands in his shoes under state law, necessarily has the same protectable interest in the property subject to forfeiture. We conclude that it would be inappropriate to affirm the district court on the ground that the conservator lacked standing to intervene under rule 24.

B.

We may affirm a decision of the district court, however, on any ground

finding support in the record. *Salmeron v. United States*, 724 F.2d 1357, 1364 (9th Cir. 1984). If the district court decision is correct, it must be affirmed, even if the court relied on wrong grounds or wrong reasoning. *Keniston v. Roberts*, 717 F.2d 1295, 1300 & n.3 (9th Cir. 1983). As part of her reasoning, the district judge relied upon *Molinaro* and *Conforte*. Although we disagree with the district court's holding that the conservator lacked standing to intervene, the *Molinaro/Conforte* disentitlement doctrine is implicit in the district court's reasoning and we therefore review this appeal on the basis of whether that doctrine bars the conservator's attempt to intervene in this proceeding.

In *Molinaro*, the Supreme Court refused to adjudicate the merits of an appeal from a criminal conviction on the

ground that the defendant was a fugitive from justice. 396 U.S. at 366. Recognizing that the defendant's fugitive status did not render the case moot, the court nonetheless dismissed the appeal because it concluded that the defendant's fugitive status "disentitle[d] [him] to call upon the resources of the Court for determination of his claims." *Ibid*.

In *Conforte*, we extended the *Molinaro* disentitlement doctrine to a civil proceeding. 692 F.2d at 589-90. In that case, Joseph Conforte and his wife sought review of a tax court decision upholding tax deficiencies and penalties that had been assessed against them. *Id*., at 589. When the appeal came before us, Joseph Conforte was a fugitive from justice as a result of his criminal conviction for tax evasion. *Ibid*. The civil and criminal cases were "related

components of a general tax evasion scheme." *Id.*, at 590. Importing the *Molinaro* doctrine from the criminal context, we refused to pass on the merits of his individual appeal and dismissed it. *Id.*, at 589-90. We reasoned that an individual who was flouting legal process has no entitlement to engage the court's resources to adjudicate his claims in an action related to his prior criminal conviction. *Id.*, at 589-90.

In *United States v. $83,320 in United States Currency*, 682 F.2d 573 (6th Cir. 1982), however, the Sixth Circuit refused to extend the *Molinaro* disentitlement doctrine to an appeal from a judgment in favor of the government in a civil forfeiture proceeding under the same statute involved here, 21 U.S.C. § 881(a)(6). Finding *Molinaro* and its progeny sufficiently distinguishable,

that court rejected the government's argument that the appeal should be dismissed. *See id.*, at 576.

The Second Circuit is the only other circuit which has addressed the applicability of the *Molinaro* disentitlement doctrine in civil forfeiture proceedings. In *United States v. $45,940 in United States Currency*, 739 F.2d 792 (2d Cir. 1984), the claimant, a fugitive from justice, sought review of a district court judgment granting forfeiture under section 231 of the Bank Secrecy Act of 1970, 31 U.S.C. § 5316. That statute expressly requires the government to give notice to "any person who appears to have an interest in the seized property of the property's liability to forfeiture and of the claimant's right to petition the Secretary of the Treasury for remission or mitigation of the forfeiture." *Id.*,

at 797, *quoting United States v. $8,850 in United States Currency*, 461 U.S. 555, 557 (1983) (footnote omitted). Proper notice was given and the fugitive defendant was the sole claimant. *Id.*, at 798. In these circumstances, the Second Circuit found the *Molinaro* doctrine applicable. In so holding, that court acknowledged the Sixth Circuit's view in *United States v. $83,320*, but declined to adopt it. *See id.*, at 797. The Second Circuit recognized the Sixth Circuit's concern for the rights of innocent third parties, but concluded that the Sixth Circuit failed to "consider that the government was seeking to dismiss only the fugitive's appeal which would not prejudice any other claimant." *Id.*

The issue before us in this case is one of first impression: whether the *Molinaro/Conforte* disentitlement doctrine

should bar intervention in a civil forfeiture proceeding by a fugitive's successor in interest. We conclude that the limited extension of that doctrine to this situation is compelled as a matter of sound policy.

The *Molinaro/Conforte* disentitlement doctrine clearly bears on whether the conservator is entitled to pursue a claim in the forfeiture proceeding on behalf of the fugitive's estate. We hold that *Conforte* would bar any defense by Lewis in the forfeiture action. The conservator's claim is solely derivative of any claim or defense that Lewis may maintain. If the fugitive is deprived of presenting any claim or defense in this action as the result of his fugitive status, the conservator of his estate must suffer the same consequences when he seeks to advance the same claim or defense.

Moreover, the proper time to address this issue is during the motion to intervene, which requires an examination as to whether the applicant has any cognizable, protectable claim. No useful purpose would be served by putting off discussion of this issue to the hearing on the merits of the forfeiture action itself. Rather, permitting intervention at this stage would only add unnecessary complexity to the forfeiture proceeding.

Nor does our holding result in any further prejudice to Lewis' interests. It is important to recognize that Lewis has complete control over the protection of his property interests in this forfeiture proceeding; if he finds his interests are sufficiently worth defending, he can terminate his fugitive status and present his own defense. This is not a situation in which a conservator has been

appointed to represent someone who is incapable, either physically, mentally or legally (such as a minor), of adequately representing his interests. Here, Lewis is solely responsible for his plight.

For these reasons, we conclude that each of the conservator's several objections to this result is unpersuasive. We will address each in turn.

First, the conservator characterizes the *Molinaro* doctrine as being limited to criminal or quasi-criminal appeals. *Conforte*, however, involved a purely civil proceeding. We pointed out that "there is no indication to the Court's decision [in *Molinaro*] that the rule stated has any less vitality in civil cases." 692 F.2d at 589. Rather, we observed that "[t]o the contrary, . . . the [*Molinaro*] rule should apply *with greater force* in civil cases whether an

individual's liberty is not a stake." *Id.* (emphasis added). *See also Doyle v. United States Department of Justice*, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981) (per curiam) (Freedom of Information Act action filed by a fugitive was barred under *Molinaro*), *cert. denied*, 445 U.S. 1002 (1982); *Broadway v. City of Montgomery*, 530 F.2d 657, 659 (5th Cir. 1976) (appeal from summary judgment in civil rights action brought by fugitive dismissed under *Molinaro*).

The conservator also asserts that *Molinaro* and its progeny only delay the time when an appeal will be heard and do not completely foreclose the right to judicial review. We also disagree with this argument. Although in some cases, *e.g.*, *Conforte*, 692 F.2d at 590, courts have generously allowed a fugitive leave to seek reinstatement of the appeal

should he surrender to the authorities within a given period, a court clearly has the power to dismiss the appeal without granting any such grace period. Indeed, in *Molinaro*, the court did not hold the appeal in abeyance; it dismissed the appeal entirely. 396 U.S. at 366.

Next, Gerald argues that the *Molinaro* disentitlement doctrine should apply only when the fugitive seeks relief based upon a claim directly related to the prior criminal conviction. We need not decide this issue. It is clear from the facts of this case that Lewis' criminal conviction and the property involved in this civil forfeiture proceeding are integrally related parts of the same unlawful drug dealing scheme. Thus, as we observed in *Conforte*, "[w]e need not decide whether *Molinaro* demands

such a nexus requirement." 692 F.2d at 590.

The conservator further asserts that application of the *Molinaro* disentitlement doctrine in this case works "to bar any party from contesting these forfeitures." He maintains that individuals who have a potential interest in the property at issue are thereby deprived of their due process rights. But the government did not argue, nor did the district court hold, that *all* individuals are precluded from intervening in the civil forfeiture proceeding because of Lewis' fugitive status. Rather, the district court's denial of intervention was limited to the conservator who stood in Lewis' shoes. Indeed, Lewis' girlfriend and his lawyers were not barred by the *Molinaro/Conforte* disentitlement doctrine from pursuing their claims to

the property. *See, e.g., Conforte,* 692 F.2d at 590-94 (deciding claims of Sally Conforte, who was not a fugitive). Other individuals with a cognizable interest in the property could have sought leave to intervene. *See ibid.*

In raising this issue, the conservator draws our attention to the Sixth Circuit's decision in *United States v. $83,320,* 682 F.2d at 576. He argues that the Sixth Circuit's concern for the rights of innocent third parties "has even greater application . . . where the party seeking to defend against the government's claim is not the missing defendant but rather the conservator of the missing defendant's estate who owes a fiduciary duty to the estate's creditors and beneficiaries." He also emphasizes that unlike the forfeiture statute involved in the Second Circuit's decision

in *United States v. $45,940*, 739 F.2d at 793 (31 U.S.C. § 5316), the forfeiture statute involved in the present case does not provide for notifying any person who appears to have an interest in the property, such as creditors, of the forfeiture proceeding.

We decline to adopt the Sixth Circuit's reasoning. Clearly, the individual who stands to gain most by allowing the conservator to intervene is Lewis. Innocent creditors and beneficiaries, if any, would benefit only secondarily. Moreover, mere speculation that innocent third parties might have an interest in the forfeited property is not sufficient t overcome the application of the *Molinaro/Conforte* disentitlement doctrine in this case. Furthermore, the conservator cannot complaint of lack of notice to other interested parties. The

record clearly reflects that individuals with an interest in the property had notice of the forfeiture proceedings. The conservator himself was an individual creditor and could have sought leave to intervene in that capacity.

The conservator's concern for the rights of the Lewis' creditors and beneficiaries is commendable, but he lacks standing to represent their rights because he represents only Lewis' estate. The fact that the conservator is charged under Cal. Prob. Code § 2462 (West 1981) with the fiduciary responsibility to prosecute and defend all claims involving property in which the estate has an interest does not change this conclusion. In these circumstances, no one was deprived of their due process rights. *See United States v. $45,940*, 739 F.2d at 796-97.

The conservator also maintains that this case differs from *Molinaro* because here, the fugitive defendant did not *initiate* the proceedings *in absentia* to seek some type of affirmative relief from the courts. Rather, Lewis, and the conservator as his successor in interest, seek only to defend against an action initiated by the government. We need not decide that issue. Where, as here, Lewis had notice of the already filed forfeiture proceedings and voluntarily elected to flee the jurisdiction of the courts, the conservator is bound by Lewis' decision to forgo defending the forfeiture action.

Finally, we reject the conservator's argument that the district court ruled prematurely on his motion to intervene, as well as his contention that the district judge erred by incorporating by

reference her findings from previous hearings. These claims of error are premised on the conservator's erroneous belief that he could relitigate the issue of whether Lewis willfully absented himself from the court's jurisdiction when the merits of the forfeiture action were heard.

The record reveals that in making her determination on the conservator's motion for intervention, the district judge incorporated by reference the record of the sentencing hearing and the record of the bond forfeiture hearings. The same district judge presided over those various hearings.

The critical factual determination incorporated by the district judge was her previous finding that Lewis voluntarily fled the jurisdiction. This factual determination was made at the bond

forfeiture hearing at which Gerald appeared as a party, both in his personal and representative capacities. The conservator merely sought to relitigate this factual determination at the hearing on the motion to intervene. The district court properly rejected this attempt.

As a party at the prior hearing, the conservator is collaterally estopped from relitigating an issue that was previously decided. *See Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1518-19 (9th Cir. 1985). *See also United States v. $149,345 in United States Currency*, 747 F.2d 1278, 1280 (9th Cir. 1984) (res judicata applies to forfeiture actions under 21 U.S.C. § 881(a)(6)). There is no question that the conservator had a full and fair opportunity at the bond forfeiture hearing to contest a finding that Lewis was a fleeing felon, nor is there any

question that the conservator had a sufficient incentive--both as representative of Lewis' estate and with regard to his own personal interests as surety--to put forth his best defense. The conservator did not attempt to offer any newly obtained evidence to indicate that the prior finding of fugitive status was erroneous.

III

The conservator also challenges the district court's entry of summary judgment on the ground that he was not given a reasonable opportunity to conduct discovery in order to challenge the government's motion. This argument is meritless in light of our holding affirming the district court's denial of the conservator's motion to intervene.

The conservator's argument is based on the erroneous assumption that he may

challenge the district court's order granting summary judgment. "The general rule is that one who was not a party of record before the trial court may not appeal that court's judgment" unless extraordinary circumstances are present. *Washoe Tribe v. Greenley*, 674 F.2d 816, 818 (9th Cir. 1982); *In re Proceedings Before Federal Grand Jury*, 643 F.2d 641, 643 (9th Cir. 1981). The record in this case fails to reveal extraordinary circumstances to warrant departure from our general rule. *See id.* at 643.

AFFIRMED.

9437/01/GLW47/101

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. FIFTY 100-OUNCE SILVER BARS, etc., Defendant	D.C. No. CV 83-1178-K ORDER DENYING INTERVENTION
UNITED STATES OF AMERICA, Plaintiff, v. $129,374 IN UNITED STATES CURRENCY, Defendant	
UNITED STATES OF AMERICA, Plaintiff, v. $1,013.00 IN UNITED STATES CURRENCY, Defendant	

UNITED STATES OF AMERICA,

Plaintiff,

v.

One 1947 Ford Wagon (Woodie), etc.,

Defendant

UNITED STATES OF AMERICA,

Plaintiff,

v.

One 1982 JEEP WAGONEER, etc.,

Defendant

UNITED STATES OF AMERICA,

Plaintiff,

v.

One 1983 JEEP CJ-5, etc.,

Defendant

The motion of Gerald M. Geiger, as conservator for the estate of Lewis M.

Geiger, to intervene in the above captioned proceedings came on regularly for hearing on July 30, 1984, before the Honorable Judith N. Keep. Plaintiff was represented by Assistant U.S. Attorney Robert H. Plaxico. Gerald M. Geiger, as conservator, was represented by Howard D. Finkelstein and Gary L. Wollberg.

After review of the pleadings and motion papers filed by the plaintiff and the proposed intervener, and upon hearing oral argument,

IT IS HEREBY ORDERED that pursuant to rule 24 of the Fed. R. Civ. P., Gerald M. Geiger's motion to intervene is denied, for lack of standing.

As more fully set forth during the July 30, 1984, hearing, complaints of forfeiture, under 21 U.S.C. § 881(a)(6), were brought against the defendant properties in the summer and fall of

1983, following the arrest of Lewis M. Geiger and the search of his residence on April 22, 1983. Lewis M. Geiger filed claims and answers contesting the forfeiture. Thereafter, Lewis M. Geiger was adjudged guilty of related narcotics offenses after a stipulated fact trial. He failed to appear for sentencing, however.

In view of Lewis M. Geiger's failure to appear for sentencing, the bond which had secured his release pending trial was declared forfeited by this court as against Lewis M. Geiger and Gerald M. Geiger, who was personally, in his individual capacity, a co-surety on that bond.

After his brother's disappearance, Gerald M. Geiger was named as conservator of Lewis M. Geiger's estate pursuant to California state law. In that capacity,

he has moved to intervene in the instant forfeiture proceedings in order to contest the government's proposed forfeiture of the defendant properties.

At the request of the court, the plaintiff and Gerald M. Geiger have briefed the issue of whether intervention by the conservator would be barred by a conflict of interest between Gerald M. Geiger in his personal capacity as co-surety on the bond and in his capacity as conservator of the Lewis M. Geiger estate. After review of the pleadings, it appears that Gerald M. Geiger in his personal capacity and in his conservator capacity shares common goals to prevent forfeiture of the defendant properties, such that intervention need not be denied on that ground.

Plaintiff correctly points out, however, that the conservator has no

standing to contest the forfeiture and thus should not be granted permission to intervene. It is axiomatic that a felon such as Lewis M. Geiger who flees the jurisdiction of a court cannot use that court's facilities to pursue either criminal or related civil litigation. *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970); *Conforte v. C.I.R.*, 692 F.2d 587, 588-590 (9th Cir. 1982). Gerald M. Geiger, as conservator of his brother's estate, stands in the shoes of his absent sibling. Therefore, because Lewis M. Geiger no longer has standing to contest the instant forfeiture proceeding, nor does Gerald M. Geiger as conservator, and

the latter's request for intervention must therefore be denied.

Dated: August 21, 1984.

[*Judith N. Keep*]
Judge of the District Court

PRESENTED BY:

PETER K. NUNEZ
United States Attorney

*/s/*_____
Robert H. Plaxico
Assistant U.S. Attorney
Attorneys for Plaintiff

APPROVED AS TO FORM:

_____
Howard D. Finkelstein
Attorney for
Gerald M. Geiger

9437 02/GLW47/102

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. FIFTY 100-OUNCE SILVER BARS, etc., Defendant	D.C. No. CV 83-1178-K ORDER GRANTING SUMMARY JUDGMENT
UNITED STATES OF AMERICA, Plaintiff, v. $129,374 IN UNITED STATES CURRENCY, Defendant	
UNITED STATES OF AMERICA, Plaintiff, v. $1,013.00 IN UNITED STATES CURRENCY, Defendant	

UNITED STATES OF AMERICA,

Plaintiff,

v.

One 1947 Ford Wagon (Woodie), etc.,

Defendant

UNITED STATES OF AMERICA,

Plaintiff,

v.

One 1982 JEEP WAGONEER, etc.,

Defendant

UNITED STATES OF AMERICA,

Plaintiff,

v.

One 1983 JEEP CJ-5, etc.,

Defendant

The motion for summary judgment of plaintiff United States of America in the

above captioned cases came on regularly for hearing on August 20, 1984, before the Honorable Judith N. Keep. Plaintiff was represented by Assistant U.S. Attorney Robert H. Plaxico. Claimant Frank Mendes was represented by Christopher J. Schatz. No appearance was made on behalf of claimants Frank & Milchen, Tina Hanson or Lewis M. Geiger, nor were any papers opposing the plaintiff's motion filed on behalf of these latter three claimants.[1]

After review of the pleadings and motion papers filed by the plaintiff and claimant Mendes, and upon hearing oral argument, the motion of the plaintiff United States for summary judgment is

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[1] The court has heretofore denied the motion of Gerald M. Geiger, as conservator of the Lewis M. Geiger estate, to intervene in these proceedings.

granted as to each of the six cases, pursuant to rule 56 of the Federal Rules of Civil Procedure.

As originally constituted, these cases consisted of six separate forfeiture actions brought by the United States as a result of a search of premises owned by Lewis M. Geiger on April 22, 1983. The six cases were:

> *United States of America v. Fifty-100 Ounce Silver Bars, Seventy 1-Ounce Gold Pieces, Two-Ounce Gold Pieces, Seven 10-Ounce Silver Pieces*, Civil No. 83-1337-N(M)
>
> *United States of America v. $129,374 In United States Currency*, Civil No. 83-1178-K(M)
>
> *United States of America v. $1,013.00 In U.S. Currency*, Civil No. 83-1180-JLI(H)
>
> *United States of America v. One 1947 Ford Wagon (Woodie), VIN 799A1655148, California License No. "84" 142UZW, Its Tools and Appurtenances*, Civil No. 83-1179-G(M)

United States of America v. One 1982 Jeep Wagoneer, VIN 1JCCA-15NOCTO33554, California License No. "84" 1E1B405, Its Tools and Appurtenances, Civil No. 83-1256-G(I)

United States of America v. One 1983 Jeep CJ-5, VIN 1JCCM85-AYDTO39730, California License No. "83" Temp. 385239Z, Its Tools and Appurtenances, Civil No. 83-1317-T(H)

Subsequently, these six cases were consolidated into a single matter, under the Court No. 83-1178-K(M).

Lewis M. Geiger and Tina Hanson filed claims contesting the forfeiture of the silver and gold and the $129,374 in currency; Geiger also filed claims contesting the forfeiture of the 1947 Ford Wagon, the 1982 Jeep Wagoneer and the $1,013 in currency. The law firm of Frank & Milchen filed claims on behalf of all the aforementioned property, on the basis of a purported assignment it received from claimant Geiger after his

arrest and the seizure of his properties. Mendes filed a single claim contesting the forfeiture of the 1983 Jeep CJ-5.

On May 4, 1984, the United States filed its motion for summary judgment with regard to all of the defendant properties. No response was made by claimants Geiger, Hanson or Frank & Milchen. Geiger, moreover, has been determined in other proceedings to have fled the jurisdiction and thus lacks standing to pursue his claims in this forfeiture action. *See Molinero v. New Jersey*, 396 U.S. 365 (1970); *Conforte v. C.I.R.*, 692 F.2d 587 (9th Cir. 1981).

Therefore, under the principles of the aforementioned cases and local rule 220-8(4), summary judgment would be appropriate in favor of the United States vis-a-vis the properties towards which Geiger, Hanson and Frank & Milchen have

filed claims. In addition, however, as set forth more fully during the August 20, 1984, hearing, the court finds that the evidence presented by the government in its summary judgment motion is more than sufficient to constitute the probable cause necessary to justify forfeiture of property under 28 U.S.C. § 881(a)(6). *See* 19 U.S.C. § 1615; *United States v. One 56-Foot Yacht Named Tahuna*, 702 F.2d 1276 (9th Cir. 1983). The court also finds that the purported assignment of the defendant properties to the law firm of Frank & Milchen from Geiger is invalid inasmuch as forfeiture of property takes place upon commission of the illegal act rending the property forfeitable. *Simmons v. United States*, 541 F.2d 1351 (9th Cir. 1976).

The court also finds that the government has presented sufficient

evidence to constitute the probable cause necessary to justify forfeiture of the 1983 Jeep CJ-5 for which claimant Mendes has filed a claim. In response to the evidence presented by the government, Mendes has presented no evidence whatsoever suggesting that the funds used to purchase the jeep were not derived from drug transactions.

Accordingly, it is hereby ordered that an order of summary judgment and a final judgment order be entered with respect to all six of the defendant

properties claimed by Geiger, Hanson, Frank & Milchen and Mendes.

Dated: October 11, 1984.

[*Judith N. Keep*]
Judge of the District Court

PRESENTED BY:

PETER K. NUNEZ
United States Attorney

*/s/*_____
Robert H. Plaxico
Assistant U.S. Attorney
Attorneys for Plaintiff

APPROVED AS TO FORM:

*/s/*_____
Christopher J. Schatz
Attorney for Claimant
Frank Mendes

9437.01/GLW47/103

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. FIFTY 100-OUNCE SILVER BARS, etc., Defendant	D.C. No. CV 83-1178-K JUDGMENT
UNITED STATES OF AMERICA, Plaintiff, v. $129,374 IN UNITED STATES CURRENCY, Defendant	
UNITED STATES OF AMERICA, Plaintiff, v. $1,013.00 IN UNITED STATES CURRENCY, Defendant	

UNITED STATES OF AMERICA,	)
Plaintiff,	)
v.	)
One 1947 Ford Wagon (Woodie), etc.,	)
Defendant	)

UNITED STATES OF AMERICA,	)
Plaintiff,	)
v.	)
One 1982 JEEP WAGONEER, etc.,	)
Defendant	)

UNITED STATES OF AMERICA,	)
Plaintiff,	)
v.	)
One 1983 JEEP CJ-5, etc.,	)
Defendant	)

Good cause showing, IT IS HEREBY ORDERED AND DECREED that:

All right title and interest to the defendant properties in the above captioned cases is hereby forfeited to the United States. The defendant properties shall be released by the United States Marshal to the seizing agency for disposition.

The United States Marshal is directed to deduct from the claim and cost bonds filed in the 1982 Jeep Wagoneer case and the $1,013 currency case its expenses and to hold the remainder of the bonds, if any, until such time as Lewis M. Geiger should appear to claim such remainder.

Dated: October 11, 1984.

[*Judith N. Keep*]
Judge of the District Court

9437.02/GLW47/104

(2)

No. 85-898

Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

GERALD M. GEIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

STEPHEN S. TROTT
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the conservator of a fugitive's estate may intervene in an action seeking forfeiture of certain of the fugitive's assets.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bonahan v. *Nebraska*, 125 U.S. 692	4
Broadway v. *City of Montgomery*, 530 F.2d 657	4
Conforte v. *Commissioner*, 692 F.2d 587, stay denied, 459 U.S. 1309	3, 4, 6
Doyle v. *United States Department of Justice*, 668 F.2d 1365, cert. denied, 455 U.S. 1002	4
Estelle v. *Dorrough*, 420 U.S. 534	4
Johnson v. *Laird*, 432 F.2d 77	8
Molinaro v. *New Jersey*, 396 U.S. 365	2, 3, 4, 6
Pepper v. *Litton*, 308 U.S. 295	7
Schuster v. *United States*, 765 F.2d 1047	4
Smith v. *United States*, 94 U.S. 97	4
United States ex rel. Bailey v. *United States Commanding Officer of the Office of the Provost Marshal*, 496 F.2d 324	4
United States v. *Brock*, 747 F.2d 761	7
United States v. *Eighty-Three Thousand Three Hundred Twenty Dollars ($83,320) in United States Currency*, 682 F.2d 573	5, 7, 8
United States v. *Forty-Five Thousand Nine Hundred Forty Dollars ($45,940) in United States Currency*, 739 F.2d 792	5, 7
United States v. *Sharpe*, No. 83-529 (Mar. 20, 1985)	4, 8
United States v. *Snow*, 748 F.2d 928	8

Statute and regulations	Page
21 U.S.C. 881 (a) (6)	2, 6
19 C.F.R.:	
Section 162.31	6
Section 162.63	6
21 C.F.R. 1316.75	6

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-898

GERALD M. GEIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A32) is reported at 769 F.2d 583. The orders of the district court (Pet. App. A33-A39, A40-A48) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1985. The petition for a writ of certiorari was filed on November 19, 1985. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner's brother, Lewis Geiger, was arrested on April 22, 1983, following a search of his home that uncovered large quantities of cocaine. Law enforcement officials seized assets discovered in the home, including $130,000 in United States currency as well as gold and silver coins and ingots, that they believed to be proceeds of illegal narcotics transactions and therefore subject to forfeiture pursuant to 21 U.S.C. 881(a)(6). Lewis was released on a $150,000 surety bond secured by petitioner and petitioner's wife. Pet. App. A2-A3, A4.

The government initiated forfeiture proceedings in June and July 1983 in the United States District Court for the Southern District of California. Lewis and his girlfriend contested the forfeiture. In December 1983, however, Lewis, having been found guilty of numerous federal narcotics offenses, failed to appear for his sentencing. The district court declared that the surety bond was forfeited and later entered judgment on default of the forfeited bond against petitioner and his wife. Pet. App. A3-A6.

In May 1984, the government moved for summary judgment in the asset forfeiture action. Petitioner, who had secured an appointment as conservator of his fugitive brother's estate under state law, moved to intervene in the proceedings. The district court denied the motion. Pet. App. A33-A39. Relying on the fugitive disentitlement doctrine enunciated by this Court in *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970), the district court ruled that Lewis Geiger could not contest the forfeiture in light of his fugi-

tive status and that petitioner, "as conservator of his brother's estate, stands in the shoes of his absent sibling" and therefore is similarly disentitled from intervening. Pet. App. A38. The district court did, however, permit Lewis's girlfriend and former attorneys to contest the forfeiture. See *id.* at A44-A45. After finding that the government's evidence was "more than sufficient to constitute the probable cause necessary to justify forfeiture of property under 28 U.S.C. § 881(a)(6)" (Pet. App. A46), the district court entered summary judgment in favor of the government. *Id.* at A40-A51

2. The court of appeals affirmed. Pet. App. A1-A32. The court of appeals noted (*id.* at A15) that it had previously applied the *Molinaro* disentitlement doctrine to civil proceedings in *Conforte* v. *Commissioner*, 692 F.2d 587 (9th Cir. 1982), stay denied, 459 U.S. 1309 (1983) (Rehnquist, Circuit Justice), and it concluded that "the limited extension of that doctrine to this situation is compelled as a matter of sound policy." Pet. App. A19. The court of appeals reasoned that petitioner's claim as conservator "is solely derivative of any claim or defense that Lewis may maintain," and that because "the fugitive is deprived of presenting any claim or defense in this action as the result of his fugitive status, the conservator of his estate must suffer the same consequences when he seeks to advance the same claim or defense." *Ibid.* The court concluded that this result would not prejudice any claimant's interests, since Lewis "can terminate his fugitive status and present his own defense" if he so desires (*id.* at A20), and assignees or creditors of the estate—including petitioner—are free to intervene in forfeiture proceedings on their own behalf. *Id.* at A24-A27.

ARGUMENT

The decision of the court of appeals is plainly correct and warrants no further review. This Court has consistently held that a defendant's status as a fugitive "disentitles [him] to call upon the resources of the Court for determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970); see *Estelle* v. *Dorrough*, 420 U.S. 534 (1975); *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *Smith* v. *United States*, 94 U.S. 97 (1876); see also *United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985), slip op. 5-6 n.2; *id.* at 2-3 (Stevens, J., dissenting). This "longstanding and established principle of American law" (*Dorrough*, 420 U.S. at 537) is "based on the equitable principle" (*Sharpe*, slip op. 6 n.2) that a litigant brings such disentitlement "upon himself by his Janus-like conduct in seeking to invoke the processes of the law while flouting them" as a fugitive from justice. *United States ex rel. Bailey* v. *United States Commanding Officer of the Office of the Provost Marshal*, 496 F.2d 324, 326 (1st Cir. 1974).

The courts of appeals have applied the *Molinaro* disentitlement doctrine to bar a wide variety of civil claims by criminal case fugitives. See, *e.g.*, *Schuster* v. *United States*, 765 F.2d 1047 (11th Cir. 1985) (review of tax assessment); *Conforte* v. *Commissioner*, 692 F.2d 587 (9th Cir. 1982) (same); *Doyle* v. *United States Department of Justice*, 668 F.2d 1365 (D.C. Cir. 1981), cert. denied, 455 U.S. 1002 (1982) (Freedom of Information Act proceeding); *Broadway* v. *City of Montgomery*, 530 F.2d 657 (5th Cir. 1976) (suit for damages and injunctive relief); *Bailey*, 496 F.2d at 326 (challenge to regulation); see also *Conforte* v. *Commissioner*, 459 U.S. 1309, 1312 (1983) (Rehnquist, Circuit Justice) (courts of

appeals have applied disentitlement doctrine to civil proceedings "on a number of occasions" and the Court has "denied certiorari in this type case in the past"). Like the court of appeals here, the Second Circuit has ruled, consistently with these cases, that fugitives may not invoke the judicial process to challenge the forfeiture of assets acquired in connection with their criminal activity. *United States* v. *Forty-Five Thousand Nine Hundred Forty Dollars ($45,940) in United States Currency*, 739 F.2d 792, 797-798 (1984).

As petitioner (Pet. 19) and the court of appeals (Pet. App. A16) note, however, the Sixth Circuit has permitted a fugitive to appear in a forfeiture proceeding. *United States* v. *Eighty-Three Thousand Three Hundred Twenty Dollars ($83,320) in United States Currency*, 682 F.2d 573, 575-576 (1982). The court of appeals in *$83,320* concluded that the fugitive should be permitted to contest the forfeiture not to protect his own interests but because innocent third parties such as creditors might have claims to the subject assets. The Second Circuit correctly disposed of this contention in *$45,940*, reasoning that the fugitive's own disentitlement does not preclude other claimants from appearing and asserting their own interests in the property. 739 F.2d at 797.

Similarly, the court below limited application of the disentitlement doctrine to Lewis Geiger, the fugitive, and to petitioner, "the conservator who stood in Lewis' shoes." Pet. App. A24. The court of appeals noted that other persons were allowed to present their claims in this action (*id.* at A24-A25), and it went on to reason that permitting the fugitive (or his representative) to appear would not reasonably further the interests of third parties:

> Clearly, the individual who stands to gain most by allowing the conservator to intervene is Lewis. Innocent creditors and beneficiaries, if any, would benefit only secondarily. Moreover, mere speculation that innocent third parties might have an interest in the forfeited property is not sufficient t[o] overcome the application of the *Molinaro/Conforte* disentitlement doctrine in this case. Furthermore, the conservator cannot complain[] of lack of notice to other interested parties. The record clearly reflects that individuals with an interest in the property had notice of the forfeiture proceedings. The conservator himself was an individual creditor and could have sought leave to intervene in that capacity.

Id. at A26-A27. The forfeiture statute contemplates that any third party with an ownership interest in the property may appear in the action to protect his rights. See 21 U.S.C. 881(a)(6).[1] Given the ability of third parties to protect themselves—and the fact that a fugitive or conservator, if he did appear, would not necessarily enjoy the same defenses as would other claimants—there is no reason to construct an exception to the *Molinaro* doctrine to permit fugitives access to the judicial process in this context. See *Conforte* v. *Commissioner*, *supra* (barring fugitive from challenging tax deficiency but permitting his wife to do so). The only person to benefit in such circumstances would likely be the fugitive himself.[2]

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[1] Contrary to petitioner's suggestion (Pet. 18), notice to potential claimants is provided in narcotics asset forfeiture proceedings. See 19 C.F.R. 162.31, 162.63; 21 C.F.R. 1316.75.

[2] The fact that petitioner is the conservator rather than the fugitive is immaterial because he stands in the shoes of the

For a number of reasons, we do not believe that this resolution of the conflict between the decision below and *$83,320* is warranted at this time. In the first place, the Sixth Circuit has not yet had the opportunity to reconsider its brief discussion of the disentitlement doctrine in light of the reasoning of the Second Circuit in *$45,940* and the court of appeals in this case.[3] Moreover, the conflict is of little practical consequence. In *$83,320* itself, the court of appeals ruled for the government on the merits.[4] Despite the

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fugitive in all respects. Pet. App. A19, A24. While petitioner argues (Pet. 18-19) that he has a duty under state law to defend the property of the estate, he points to no authority for the proposition that he would be able to assert more extensive rights or would be subject to different duties in connection with the forfeiture proceeding than his brother would be. In fact, the fugitive presumably would have the same obligations as the conservator to preserve his assets for claims of creditors and other beneficiaries. Cf. *Pepper* v. *Litton*, 308 U.S. 295, 306-307 (1939). Moreover, the court of appeals' holding bars a conservator from intervening only where "he seeks to advance the same claim or defense" as the fugitive. Pet. App. A19. If the conservator could, contrary to our submission, assert a different claim from the fugitive, he would not necessarily be foreclosed from doing so. Finally, distinguishing between the conservator and the fugitive as petitioner suggests would permit a fugitive (someone with a proven propensity for flouting the law) to evade the disentitlement doctrine merely by asserting his interests through the subterfuge of a conservatorship.

[3] Neither the Sixth Circuit nor any other court of appeals has relied on *$83,320* to permit a fugitive or his representative to appear in a forfeiture proceeding. Cf. *United States* v. *Brock*, 747 F.2d 761 (D.C. Cir. 1984) (finding against claimant, who was a fugitive at the time of trial, on the merits without consideration of disentitlement doctrine).

[4] Accordingly, there was no reason for the government to seek further review in that case.

fact that "escapes by persons engaged in the lucrative business of smuggling narcotics are apparently not uncommon" (*Sharpe*, slip op. 2 (Stevens, J., dissenting)), we are not aware of any case in which a fugitive or his representative has successfully challenged a government forfeiture.

Further, this case would be an inappropriate one in which to resolve the conflict because the concern for the rights of third parties on which the Sixth Circuit grounded its decision in *$83,320* is wholly absent here: third parties did appear and their claims were rejected on the merits by the district court. See Pet. App. A46. Moreover, even if petitioner were granted the right to intervene, he has not explained how that would affect the ultimate disposition of the case—the district court found that the government had presented "more than sufficient" evidence to justify the forfeiture (*ibid.*), and petitioner has not suggested how his presence would have changed that finding. Finally, the disentitlement doctrine is equitable and discretionary in nature, resting as it does on the courts' supervisory powers to do justice in each particular case. See, *e.g.*, *United States* v. *Sharpe*, slip op. 6 n.2; *id.* at 2-3, 5 n.16 (Stevens, J., dissenting); *United States* v. *Snow*, 748 F.2d 928, 930 (4th Cir. 1984); *Johnson* v. *Laird*, 432 F.2d 77, 79 (9th Cir. 1970). Accordingly, the courts of appeals may reasonably adopt somewhat different approaches in their application of the doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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